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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

VIRGINIA ROBLES, et al., Plaintiffs and Appellants, v. THOMAS WARREN WILLS, et al., Defendants and Respondents.	H040941 (Monterey County Super. Ct. No. M88477)

Virginia Robles and three of her siblings[1] appeal from a judgment entered against them in their malpractice action against their former attorneys, respondents Thomas Wills and Denise Benoit and their law firm, Wills & Benoit. Respondents had represented appellants a year earlier in a wrongful death case after their father's wheelchair ignited, resulting in his death. In a bifurcated trial of the malpractice action, a jury found that the design of the wheelchair was not a substantial factor in causing the wheelchair to ignite and did not present a substantial danger to users, thus permitting the conclusion that appellants would not have achieved a better result in the underlying action had respondents performed differently.

On appeal, plaintiffs assert evidentiary error in the trial of the design defect and causation issues. Appellants specifically contend that the court should not have admitted Virginia's statement to a defendant in the underlying action that the fire was caused by

[1] In addition to Virginia, appellants are Rose Robles Senko, Lorraine Robles Delarosa, and John Robles, Jr.

her father's cigarette. They further contend that a defense witness's expert opinion about the cause of the fire should have been excluded as conjecture. We find no evidentiary error and therefore must affirm the judgment.

Background

The dispute between the parties arose from respondents' legal representation of plaintiffs and other family members in their December 2004 lawsuit against the manufacturer and supplier of John Robles's electric wheelchair. John was fatally burned when a fire erupted as he sat confined in the wheelchair. Virginia, John's adult daughter, was also burned when she tried to remove John from it. Eight of John's family members, represented by Wills, sued Golden State Medical Supply, Inc. (GSMS) and Pride Mobility Products Corporation (Pride), asserting products liability, wrongful death, and negligence resulting in Virginia's injury. They also asserted a wrongful death claim against the owners of the apartment complex where John lived.

On January 8, 2007, the parties in the 2004 action reached a settlement in proceedings conducted by the Honorable Kay T. Kingsley. Subsequently, however, convinced that they had been coerced into settling by Wills and Judge Kingsley, appellants refused to sign a settlement agreement. Wills then successfully moved to be relieved as counsel for the family members, and Wills filed a notice of lien to secure payment for his legal services.[2]

On February 2, 2007, Pride, joined by the apartment complex owners and the guardians ad litem for two of the plaintiffs, moved to enforce the settlement. The remaining family members, having trouble finding substitute counsel even after obtaining a one-month continuance of the motion hearing, presented their opposition orally to

[2] Wills obtained an order for payment of his lien on May 1, 2007, thus permitting him $486,577.34 payable from the settlement proceeds.

Judge Kingsley. At the conclusion of the hearing the court granted the motion. A judgment of dismissal, however, was not filed until April 4, 2008.

On June 6, 2008, appellants, now represented by new counsel, moved to vacate the judgment "on the ground that the plaintiffs' 'consent' to [the] proposed settlement was obtained through duress, coercion, fraud and/or mistake." The motion was denied on August 26, 2008, and on September 28, 2010, this court affirmed the judgment of dismissal. (*Robles et al. v. GSMS, Inc.*, (Sept. 28, 2010, H033270 [nonpub. opn.].)

Meanwhile, appellants initiated the present action on January 8, 2008, against respondents. Also named was Purush Chalilpoyil, who had previously been a proposed expert witness in the underlying action. (See *Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566.) In their first amended complaint, filed on December 29, 2011, appellants alleged legal malpractice, breach of contract, and breach of fiduciary duty and constructive fraud against respondents; conspiracy to commit fraud against respondents and Chalilpoyil; and negligence of Chalilpoyil.

The parties agreed to a bifurcation of the trial so that a jury could determine whether the fire was caused by a defect in John's wheelchair before the issue of whether respondents breached the standard of care. Accordingly, in February 2013 a jury trial took place as if it were a products liability case.

By special verdict the jury found that (1) the wheelchair had "potential risks" but those risks did not present a substantial danger to its users; (2) Pride's design of the wheelchair was not a substantial factor in causing harm to either John or Virginia; and (3) GSMS was not negligent. In the second phase, the court determined that appellants were not entitled to restitution of fees and costs, which they had claimed in their first amended complaint. The court further stated that Wills had "complied with his fiduciary duties and did not coerce Plaintiffs into a settlement." Finally, the court found that the confidentiality provision of the settlement agreement in the underlying action was a standard term that was consistent with the standard of care applicable to respondents.

On April 11, 2014, appellants appealed from the January 13, 2014 judgment, which was amended on April 22, 2014.[3]

Discussion

Appellants' theory at trial was that due to a defective design of the wheelchair, the use of mismatched batteries, together with a "three-stage dumb charger," allowed hydrogen gas to be emitted, which collected under the battery hood and expanded, enveloping the chair and John Robles. Respondents argued that the wheelchair ignited when John, a heavy smoker, dropped a cigarette or burning paper towel while trying to light the cigarette. Over appellants' objection, respondents were permitted to introduce a statement Virginia had made to her landlord, a defendant in the case, that the fire was caused by John's lighting of a cigarette. Respondents also were permitted (over appellants' opposition) to adduce the testimony of their expert, William Crookshanks, who expressed the opinion that the lighting of a cigarette had caused the fire.

Appellants assert error in the admission of both witnesses' opinions. Only in their reply brief, however, do appellants acknowledge the applicable standard of review. "Trial court rulings on the admissibility of evidence, whether in limine or during trial, are generally reviewed for abuse of discretion." (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.) " 'The abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence.' [Citation.] 'Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]"

[3] Appellants' April 11, 2014 notice of appeal would be deemed untimely as directed at the January 13, 2014 judgment; and if construed as directed at the amended judgment of April 22, 2014, it is premature. Consistently with California Rules of Court, rule 8.100, however, we will liberally construe appellants' notice of appeal as having been properly filed from the amended judgment.

(*Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 919, quoting *People v. Guerra* (2006) 37 Cal.4th 1067, 1113.) "In appeals challenging discretionary trial court rulings, it is the appellant's burden to establish an abuse of discretion." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281.) These principles apply to both lay witness and expert testimony. (*People v. Thornton* (2007) 41 Cal.4th 391, 429; *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.)

1. *Admission of Virginia Robles's Statement about the Cause of the Fire*

Respondents sought to introduce deposition testimony by Louis A. Nunes, a defendant associated with the apartment complex in the underlying case. In 2006 Nunes testified that he had a short conversation with Virginia on the street before she left to get treatment for her burned hand. Nunes described the conversation as follows: "I asked her how did it happen, was it a cigarette, and she said 'yes.' [¶] Q: I'm sorry, would you repeat that again? I didn't hear you. [¶] A: Did a cigarette cause the fire and she said [y]es." Nunes explained that he had asked Virginia the question because "they were such heavy smokers, all of them."

Appellants did not explicitly object to admission of this evidence. At best their counsel *anticipated* respondents' introduction of Virginia's statement earlier, in the context of a discussion of a different issue, whether certain testimony by *Wills* should be admitted. Appellants sought to elicit Wills's acknowledgment that in preparing the underlying case, he had learned of prior fires which he believed were similar to the one at issue in the underlying case. Appellants' attorneys believed the expected testimony to qualify as an admission under Evidence Code section 1220.[4] The court challenged them on that point, noting that Wills was not a party opponent or witness in the underlying case, and the existing issues pertained solely to products liability, an area in which Wills

[4] All further statutory references are to the Evidence Code.

was not an expert. Appellants' counsel responded that "it's an admission of its relevance. Just like if in discovery he says: These are the similar fires. Doesn't matter that he's not an expert and wouldn't be qualified to [*sic*]. If he makes an admission, it's admissible against him. [¶] For instance, they're going to try and put on evidence that Virginia Robles said: It was a cigarette fire. She has no basis for that, but they're going to point out that's an admission that contradicts the positions they're taking here. It's no different than the admissions he's took [*sic*]. If he wants to take different positions than he took below, he's not bound by those positions, but he can deny them, but it does make it relevant and admissible on that basis." In other words, it was "the fact of the admission" that was relevant: "He gets to explain his admission and say: You shouldn't give that weight. I was just taking a position I didn't believe in."

The court, still unwilling to subscribe to appellants' position on the Wills testimony, reminded counsel that this was essentially a products liability case; what Wills or anyone else thought about the evidence five years earlier seemed to the court to be "totally irrelevant. It's a matter of argument. I can't see how it's evidence." Invited to address this point again, appellants' attorney replied, "I think the same—I think it's the same rule that would apply to Virginia Robles. She's not a fire expert. She has no basis to it. It's just something she said and they're going to say that's an admission of the party. [¶] THE COURT: We're not talking about that."

It is clear from this discussion that the focus of the parties and the court was on whether appellants could introduce testimony by Wills which appellants believed to be an admission. The reference to Virginia was limited to this context; indeed, implied in the comparison was an acknowledgment that Virginia's statement about the cause of the fire was arguably an admission of a party opponent.

When Nunes's deposition was offered into evidence at trial, the record indicates some kind of opposition by appellants, but not the specific basis of their objection. The court did question the admissibility of some unidentified statements by Nunes as hearsay,

but it appeared to dismiss the objection pertaining to Virginia.[5] Nothing in the record reflects any argument below that Virginia's statement to Nunes was an inadmissible opinion.

In their opening brief, appellants concede that there was a "conceivable basis" for admitting the latter as an exception to the hearsay rule under section 1220 as an admission of a party. They do not assert, as they did below, that because respondents would introduce Virginia's statement, that of Wills should also be admitted; instead, they turn this argument on its head and claim that just because *Wills*'*s* expected testimony regarding prior incidents was *rejected* "because he lacked expertise in the subject . . . [t]he same rule should apply to [Virginia's] statement." This contention is flawed. First, appellants' assertion that Virginia's statement was improper opinion evidence has been forfeited by their acceptance of it on that basis at the section 402 hearing on the matter and by their failure to object at trial when Nunes's deposition testimony was read to the jury. Second, the rejection of a party's reliance on section 1220 as to one witness does not automatically invalidate application of the provision as to any other witness. Wills's testimony was excluded because it was irrelevant what he believed five years earlier when serving as appellants' attorney. Third, appellants do not argue that Virginia's statement about the cause of the fire should not have been treated as an improperly admitted admission. Nor do they assert any other basis for finding an abuse of discretion in admitting Nunes's deposition testimony.

Appellants alternatively suggest that "if this Court finds that expertise in a subject matter is not required for admission of a party statement under Evidence Code section 1220, then the Court erred in excluding statements from Respondent Wills about his belief that the fire started due to a defective battery." Appellants do not elaborate on

[5] Commenting on the hearsay nature of several proffered statements, the court stated, "There are a lot of somebody else telling him this and telling him that. Virginia is fine."

this brief assertion in their opening brief; not until their reply brief do they return to the argument they made to the trial court, arguing that the same standards should be applied to both witnesses. In their view, "there is a far greater case for the admissibility of Mr. Wills' admission than Virginia's."

Respondents complain that appellants' challenge to the exclusion of Wills's proposed testimony was not adequately raised in their opening brief and must therefore be disregarded. However, we grant respondents' motion to file a supplemental brief addressing the new discussion in appellants' reply brief. We need not dwell on appellants' theory in any event, because the circumstances of the Virginia's statement and the anticipated statement of Wills are distinguishable. Wills was not making an admission as a party opponent in the underlying case; he was asserting a position on behalf of his clients, and whatever he may have privately believed *at that time* as to the cause of the fire was irrelevant in the present case. No comparison between Wills's advocacy in the preceding case and Nunes's testimony about Virginia's statement, which was justified under the section 1220 exception to the hearsay rule, can rationally be sustained.

2. *Admission of* "*Conjecture*" *Testimony by Crookshanks*

Appellants moved in limine to exclude any opinion by respondents' expert, William Crookshanks, that the fire had started when John dropped a burning piece of paper towel on the seat of his wheelchair as he was trying to light his cigarette with the paper towel. Appellants maintained that Crookshanks's opinion was unreliable and irrelevant because he had admittedly relied on conjecture to reach his conclusions about the cause of the fire. Appellants also argued that even if John had been trying to light a cigarette, the released hydrogen acted as a fuel that ignited the wheelchair.

At the hearing on the motion the trial court noted that any weakness in the defense expert's conclusions could be exposed during cross-examination.[6] The trial court tentatively denied the motion, subject to a hearing under section 402. Appellants later submitted another motion in limine seeking exclusion of Crookshanks's testimony on the ground that he had been unprepared at his deposition.

The court finally denied appellants' requests to exclude the testimony of the witness, and Crookshanks, who had been a fire investigator for the last 50 years, was thereafter qualified without objection as an expert in "the cause and origin of fires and fire investigation." Using color photographs of the fire scene in the kitchen, Crookshanks pointed out the pack of cigarettes and a roll of paper towels lying on the floor. He further testified that the battery had been damaged only in the front left corner and melting from the top downward in the area of the front left corner of the chair. The heaviest fire damage to the cushion was on the right side, and there did not appear to be "evidence of any accelerant such as hydrogen gas." Crookshanks's investigation led him to conclude that "Mr. Robles was attempting to possibly light his cigarette with the use of a paper towel and somehow the towel fell and probably ignited him. The fire started in front of him on possibly the cushion." Until the morning of his testimony Crookshanks had not known that John was legally blind and that he could not feel anything on his right side. That, in Crookshanks's opinion, could have caused the fire to grow in intensity without John's knowing it. On cross-examination Crookshanks clarified that the "area of origin" was the front of the cushion.

Again without acknowledging the standard of review, appellants assert error in admitting this testimony. Their statement that Crookshanks *admitted* that his opinion was conjecture was based on his deposition testimony; yet appellants do not direct us to that

[6] Addressing appellants' counsel the court queried, "Just because your folks say it's hydrogen gas; somebody else doesn't even consider that and says it was a flaming Arapaho arrow, what's the difference? It's just whose expert the jury buys."

testimony itself. The failure to provide the factual basis of their legal position by reference to the record is fatal to their argument on appeal. (Cal. Rules of Court, rule 8.204(a)(1)(C) [any reference to a matter in the record must be supported by a citation to the volume and page number of the record where the matter appears]; see *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856 [if party fails to support an argument with necessary citations to the record, "that portion of the brief may be stricken and the argument deemed to have been waived"].)

Absent any such evidence in the record, there is no support for the assertion that Crookshanks's opinion was only conjecture. In his deposition, portions of which were supplied by respondents, he testified that the opinions he formed and his written report were based on the opinions he formed in the course of a three-hour inspection of the apartment and the wheelchair. Based on his "visual examination of the power chair," he opined that the fire had not started from the battery, but that it "had dropped down from the cushion and ignited and the fire burnt back up." In stating his conclusions at trial, he did not represent them as conjecture, but as "based on everything I observed when I did my investigation."

Appellants next renew their argument that Crookshanks should not have been permitted to testify at trial because he was unprepared at his deposition to discuss the basis for his opinions. They point to the following line of questioning in Crookshanks's January 21, 2013 deposition, which took place one day before the hearing on the motion to exclude his opinion: "Q. Okay. Did you rely on anything you saw in color photographs in forming your opinions? [¶] A. I can't recall. [¶] Q. You said, though, you wouldn't feel comfortable testifying at trial without looking at color photographs. Correct? [¶] A. Correct. [¶] Q. You understood you were supposed to be prepared to testify as if you were at trial at this deposition. Correct? [¶] [Respondents' counsel]: Objection: Argumentative. [¶] MR. MARKOWITZ [appellants' counsel]: Q. Did you

know that? [¶] A. No. [¶] Q. Okay. To be prepared to give your full testimony, you would need to see good color copies of the photographs. Correct? [¶] A. Yes."

Appellants omit the earlier deposition testimony, in which Crookshanks was offered black and white photographs because appellants' counsel had none available: "Okay. Let's look at photographs of that [scene around the paper towel and cigarettes]. *I wish I could get color photographs but, unfortunately, my IT department is not here, so we'll have to use these*." (Italics added.) Later Markowitz called for a break and returned with color photographs on his iPad—"Still not the best quality, but I think you can see a little bit more than you can on the black and whites." He then asked Crookshanks if it would be helpful to look at "good color photographs" to refresh his recollection as to the "cause and origin" of the fire. Crookshanks said it would.

Respondents' attorney, Daniel W. Ballesteros, twice offered to show Crookshanks the color photographs and arrange for a new deposition on them. To the second offer Markowitz replied, "Then I do, then we can arrange it after. [¶] I have nothing further." In a letter to Markowitz two weeks later, however, Ballesteros noted, "During the course of the deposition, you chose to show Mr. Crookshanks black and white photographs. That was your decision. You were in possession of color photographs from the [f]ire [d]epartment, [p]olice [d]epartment and Mr. Crookshanks' own report and deposition. The fact that he was unable to determine what was depicted in some of those black and white photos does not render him 'unprepared to testify.' Rather, it reflects a choice made by counsel. [¶] In addition, I told you on the record . . . [that] I was going to make sure that he had the color photocopies and reviewed them and that if you wanted to take his further deposition we could arrange a further time for you [to] take the deposition based on that. At no time did you ever take me up on my offer." Even after declaring that they could "arrange it after," Ballesteros pointed out, Markowitz "never followed up and requested any further deposition." Yet one more time Ballesteros said he would leave the offer open if Markowitz "belatedly wish[ed] to accept this offer."

Appellants have failed to show that the unavailability of color photographs compelled exclusion of Crookshanks's trial testimony. The trial court evidently was not convinced that the handicap on Crookshanks's deposition testimony was attributable to his lack of preparation. Counsel himself was in a position to remedy the asserted deficiencies in his examination at the deposition. As respondents pointed out, Crookshanks could have been questioned with color photographs if appellants' attorney had either brought color copies to the deposition himself or followed up on Ballesteros's repeated offer to bring Crookshanks back for further deposition. There is no indication from the record that had either of those circumstances occurred, appellants would not have been able to obtain the deposition testimony they needed to prepare an effective examination of Crookshanks at trial. There is also no indication, or even claim, that appellants were handicapped at trial by "unfair surprise" which necessitated exclusion, as in *Cottini v. Enloe Medical Center* (2014) 226 Cal.App.4th 401, 426, where the plaintiff resisted disclosure and deposition of his expert witness; nor have appellants asserted that they were unable to " 'cope with the expert's specialized knowledge.' [Citation.]" (*Id.* at p. 416.) The trial court evidently found no conduct by respondents that was so "egregious" in offering their expert that exclusion of Crookshanks's testimony was compelled. (*Id.* at p. 428.)

In short, appellants have not established either that Crookshanks was at fault for being unable to use color photographs at his deposition or that they suffered prejudice at trial from any limitations on counsel's examination at that deposition. It was the province of the trial court to determine whether the asserted limitation required exclusion of Crookshanks's expert testimony. Because we cannot say that it acted in an " 'arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage

of justice,' " appellants have failed to show an abuse of discretion in the court's ruling. (*Employers Reinsurance Co. v. Superior Court, supra*, 161 Cal.App.4th at p. 919.)[7]

Disposition

The judgment is affirmed.[8]

[7] It is noteworthy that appellants do not take issue with the trial court's decision in phase two of the trial, including its finding that Wills had "complied with his fiduciary duties and did not coerce Plaintiffs into a settlement."

[8] Respondents' motion for judicial notice is granted. The motion for sanctions under California Rules of Court, rule 8.276, is denied.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.

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